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July 9, 1992

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JUL 9 1992

Donna R. Searcy  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ATTN: The Honorable Edward J. Kuhlmann  
Administrative Law Judge

ORIGINAL  
FILE

RE: Central Florida Educational Foundation, Inc., et. al., M  
Docket No. 92-33

Dear Ms. Searcy:

Transmitted herewith, on behalf of Central Florida Educational Foundation, Inc., is an original and six copies of its Petition to Enlarge Issues filed in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

MAY & DUNNE, CHARTERED

By: Joseph E. Dunne III  
Joseph E. Dunne III  
Attorney for Central Florida  
Educational Foundation, Inc.

JED:gmcA41  
enclosures

xc: All Per Attached Certificate of Service  
James S. Hoge

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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

RECEIVED

JUL 9 1992

In re Applications of

CENTRAL FLORIDA EDUCATIONAL  
FOUNDATION, INC.  
Channel 203C3  
Union Park, Florida

BIBLE BROADCASTING NETWORK, INC.  
Channel 202C2  
Conway, Florida

SOUTHWEST FLORIDA COMMUNITY RADIO,  
INC.  
Channel 202C2  
Conway, Florida

MIMS COMMUNITY RADIO, INC.  
Channel 202C1  
Oak Hill, Florida

HISPANIC BROADCAST SYSTEM, INC.  
Channel 202C3  
Lake Mary, Florida

For Construction Permit for a New  
Noncommercial Educational FM Station

TO: The Honorable Edward J. Kuhlmann  
Administrative Law Judge

) MM Docket No. 82-338  
)  
) File No. BPED-881207MA  
)  
)

) File No. BPED-890412MJ  
)  
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) File No. BPED-891127MC  
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) File No. BPED-891127MD  
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) File No. BPED-891128ME  
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**PETITION TO ENLARGE ISSUES**

Central Florida Educational Foundation, Inc. (CFEF), pursuant to section 1.229(c) of the Commission's Rules and Regulations, 47 C.F.R. § 1.229 (c)(1992), respectfully requests that the hearing issues specified in the Hearing Designation Order, Central Florida Educational Foundation, Inc., et. al., 57 Fed. Reg. 8875 (March 13, 1992) be enlarged as hereinafter set forth. As grounds therefore, CFEF shows and states as follows.

## **I. Factual Background**

1. The application of Mims Community Radio, Inc. (Mims) was filed on November 24, 1989. At the time the application was filed, and at all times thereafter, Mims has been represented by communications counsel. When Mims application was filed it stated in section V-B of its application that it would be located on a tower shared by WPGS (AM) at 28° 44' 21" and 80° 53' 01" ( see Attachment A). Subsequently, in an amendment filed March 27, 1990, Mims again identified its proposed site as the WPGS tower (see Attachment B). At the time the application was filed, and until September 20, 1991, the licensee of WPGS(AM) was Florida Public Radio, Inc., the president of which was Randy Henry, who prepared Mims application as its "technical consultant." In its application Mims also included a "Certification of Site Availability" identifying Randy Henry as the source of the applicant's reasonable assurance to use the site (see Attachment C).

2. WPGS(AM) was sold by Florida Public Radio, Inc. to WPGS, Inc. in a sale consummated by the parties on September 20, 1991 (see Attachment D). The president and 100 percent owner of WPGS, Inc. is Marie M. Doherty. A Verified Statement from Ms. Doherty is included in Attachment E. In that Statement Ms. Doherty avers that she is the owner of WPGS, and that "no representative of Mims Radio, Inc. has ever contacted me, or anyone in authority at WPGS, requesting authority to specify our site in their application." Moreover, not only has no one ever asked Ms. Doherty whether the site was available, if someone had asked the answer would likely be

negative. According to Ms. Doherty, co-location would create technical problems "which would be extremely difficult to overcome." Accordingly, Mims, since at least September 20, 1991, has not had "reasonable assurance" concerning the availability of its antenna site, in fact, it has had no authority to specify the site at all.

## **II. Legal Argument**

### **A. Mims Lack of An Antenna Site is a Fact of Probable Decisional Significance Warranting Consideration**

3. The decisional significance of the availability of an applicant's antenna site is well established by Commission precedent. Indeed, the Commission has declared that "it is elementary that a prospective construction permittee must have, if little else, an antenna site, a technical keystone of the Broadcasting operation." South Florida Broadcasting Co., 99 F.C.C.2d 840, 841, 57 R.R.2d 495, 497 (Rev. Bd. 1984). An applicant must specify a viable antenna site, "otherwise its application [is] substantially incomplete and patently not in compliance with the Commission rules, and [the applicant] would be technically unqualified to be a Commission licensee." Colorado Television, Inc., \_\_\_\_\_ F.C.C.2d\_\_\_\_\_, 56 R.R.2d 1080 (Rev. Bd. 1984). Applicants who could not prove the availability of their antenna sites have been disqualified on technical grounds in several recent Commission decisions. See, e.g., 62 Broadcasting, Inc., 4 FCC Rcd. 1768 (Rev. Bd. 1989), rev. denied, FCC 90-48 (released Feb. 13, 1990). The decisional significance of an applicant's transmitter site is particularly clear in this

proceeding, where there is an areas and populations issue upon whose resolution the proceeding turns.

**B. Antenna Site Availability Issue**

4. As noted above, the Commission has established in a number of cases that an applicant must have a transmitter site, the "technical keystone of the broadcasting operation." South Florida Broadcasting Co., supra, 57 R.R.2d at 497. "It is black letter Commission law that an applicant must have 'reasonable assurance' of its transmitter site when it originally files its application (cite omitted), and it must make ordinary efforts to assure that it maintains its site throughout the application process. Alden Communications Corp., 2 FCC Rcd. 3462, 3463 (Rev. Bd. 1987)." Berea Broadcasting Co., Inc., 4 FCC Rcd. 8813, 67 R.R.2d 405, 406 (Rev. Bd. 1989). If Mims has not even contacted the owner of the site specified in its application, much less received permission from the site owner, it clearly does not have the requisite "reasonable assurance" of its transmitter site. The "mere possibility, assumption or hope that a site will be available will not suffice." Houston Family Television, Ltd., 101 F.C.C.2d 661, 58 R.R.2d 1557, 1559 (Rev. Bd. 1985). The clear, unambiguous, and sworn statement from the person who controls the site specified in Mims application raises, at a minimum, a substantial question concerning whether the antenna site specified by Mims in its application, at least after September 20, 1991, was available to it. Accordingly, the addition of an antenna site availability issue against Mims application is warranted.

### **C. Misrepresentation/Lack of Candor**

5. Mims, as shown in the Attachments hereto has made a number of explicit representations that it possessed authority or permission from the owner of the WPGS site to specify the WPGS tower as its site. Attachment D, however, contains the Verified Statement of the present owner of the site, who has owned the site since September 20, 1991, which avers that she has never been approached by a representative of Mims, much less granted Mims permission to use the site. Mims, moreover, must be charged with knowledge of the WPGS sale since the its "technical consultant," who has prepared all the engineering amendments to the application, was a principal of the licensee which sold the station. Surely the knowledge possessed by its "technical consultant" must be imputed to Mims. Mims, accordingly, must be charged with knowledge that it has been representing to the Commission that it had permission to use a site for which it had not even sought the owner's permission. Mims neither sought Ms. Doherty's permission, or informed the FCC of the status of its site, for some ten months.

6. The Commission has repeatedly noted, more often in recent times, that "[b]asic to the functioning of the regulatory process is the ability of the Commission to rely on the representations of those whom it licenses and those who come before it seeking licenses." William M. Rogers, 99 F.C.C.2d 187, 52 R.R.2d 831, 842 (1982) (footnote omitted). In several recent cases the Commission has held that misrepresentation and lack of candor issues should be added in circumstances analogous to those here, where a substantial

question arises whether the applicant had any good faith basis to believe that it had reasonable assurance of the availability of an antenna site. See, e.g., *Duchess Communications Corp.*, 101 F.C.C.2d 243, 58 R.R.2d 381 (Rev. Bd. 1985) (landowner represented site for sale, applicant "assumed" land available for lease); *Cannon Communications Corp.*, 101 F.C.C.2d 169, 58 R.R.2d 950 (Rev. Bd.1985), rev. denied, FCC 86-244 (released May 15, 1986) (applicant never negotiated any terms with respect to purportedly leased site). Clearly, a good faith basis to believe a site is available requires that the applicant make an inquiry of the site owner concerning the site's availability.

### **III. Conclusion**


7. The evidence provided herein, and that which the Presiding Officer may properly take official notice, at least raises a substantial question concerning whether Mims had the requisite "reasonable assurance" of the availability of its specified site from September 20, 1991 to date. The evidence submitted here shows that Mims made no inquiry of the new owner of WPGS and would not likely have received permission if Mims had inquired. The fact that Mims neither made inquiry or informed the Commission about its lack of authority to specify the site also warrants the addition of a misrepresentation/lack of candor issue.

**WHEREFORE,** the foregoing considered, Central Florida Educational Foundation, Inc. respectfully requests the specification of the following issues against the application of Mims Community Radio, Inc.:

1. To Determine whether Mims Community Radio, Inc. has reasonable assurance of the availability of the antenna site specified its application, and, if not, whether Mims is technically qualified to be a Commission licensee.
2. To determine whether Mims Community Radio, Inc. misrepresented facts and/or was lacking in candor in representing to the Commission that it had reasonable assurance of the availability of its specified site, and the effect of the evidence adduced thereunder on the basic qualifications of Mims Community Radio, Inc. to be a Commission licensee.

Respectfully submitted,

**CENTRAL FLORIDA EDUCATIONAL  
FOUNDATION, INC.**

By:   
Joseph E. Dunne III  
Its Attorney

**MAY & DUNNE, CHARTERED**  
Suite 520  
1000 Thomas Jefferson Street, N.W.  
Washington, D.C. 20007  
(202) 298-6345

July 9, 1992

**ATTACHMENT A**

# Section V-B - FM BROADCAST ENGINEERING DATA

FOR COMMISSION USE ONLY

File No. \_\_\_\_\_

ASB Referral Date \_\_\_\_\_

Referred by \_\_\_\_\_

Name of Applicant

Mims Community Radio, Inc.

Call letters (if issued)

-NEW-

Is this application being filed in response to a window? ☐ Yes ☒ No

If Yes, specify closing date: \_\_\_\_\_

Purpose of Application: (check appropriate boxes)

☒ Construct a new (main) facility

☐ Construct a new auxiliary facility

☐ Modify existing construction permit for main facility

☐ Modify existing construction permit for auxiliary facility

☐ Modify licensed main facility

☐ Modify licensed auxiliary facility

If purpose is to modify, indicate below the nature of change(s) and specify the file number(s) of the authorizations affected.

☐ Antenna supporting-structure height

☐ Effective radiated power

☐ Antenna height above average terrain

☐ Frequency

☐ Antenna location

☐ Class

☐ Main Studio location

☐ Other (Summarize briefly)

File Number(s) \_\_\_\_\_

## 1. Allocation:

Channel No.	Principal community to be served:		
	City	County	State
202	Oak Hill	Volusia	FL

Class (check only one box below)

☐ A ☐ B1 ☐ B ☐ C3

☐ C2 ☒ C1 ☐ C ☐ D

## 2. Exact location of antenna.

(a) Specify address, city, county and state. If no address, specify distance and bearing relative to the nearest town or landmark.

4220 Golden Shores Blvd, Mims, FL; County of Brevard

(b) Geographical coordinates (to nearest second). If mounted on element of an AM array, specify coordinates of center of array. Otherwise, specify tower location. Specify South Latitude or East Longitude where applicable; otherwise, North Latitude or West Longitude will be presumed.

Latitude	28°	44'	21"	Longitude	80°	53'	01"
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## 3. Is the supporting structure the same as that of another station(s) or proposed in another pending

application(s)? WPGS AM will vacate use of the tower as per condition stated in sale of WPGS AM: BAL 891019EB

☒ Yes ☐ No

If Yes, give call letter(s) or file number(s) or both.

If proposal involves a change in height of an existing structure, specify existing height above ground level including antenna, all other appurtenances, and lighting, if any.

No change in tower height is involved

**ATTACHMENT B**

NEW (FM) at Oak Hill, FL  
Mims Community Radio, Inc.  
File # BPED891127MD  
March 7, 1990

SUPPLEMENTAL ENGINEERING EXHIBITS  
REQUESTED IN COMMISSION LETTER DATED JANUARY 19, 1990

TABLE OF CONTENTS

<u>Exhibit #</u>	<u>Exhibit Subject</u>
900307-1	Discussion of Issues
900307-2	FCC Authorization at Proposed Coordinates
900307-3	FAA Authorization at Proposed Coordinates
900307-4	Potential Environmental Significance

Prepared for  
Mims Community Radio, Inc. by  
Technical Director: Randy Henry

Randy Henry

March 7, 1990

Date

EXHIBIT # 900307-4

NEW (FM) at Oak Hill, FL  
Mims Community Radio, Inc.  
BPED 891127MD  
March 7, 1990

POTENTIAL ENVIRONMENTAL SIGNIFICANCE

For demonstrating compliance with ANSI guidelines, the proposal was given a worst case evaluation.

Section II of OST Bulletin No. 65 presents a worst case formula for determining power density (S). This proposal is for 80Kw Vertical Polarization only, with a center of radiation at 54 meters above ground. The formula, which assumes a worst case antenna (isotropic radiator) predicts the facility to create a power density of .917 mw/cm<sup>2</sup>.

Appendix A, Table 1 shows that the maximum power density for public and occupational exposure is 1 mw/cm<sup>2</sup>, leaving this proposed FM facility within ANSI limits.

In addition, it is certain that a multi-bay antenna will be used which will create a far lesser power density.

Appendix A, Table 1 for FM broadcast shows that an 80Kw facility using single polarization would be required to have its center of radiation a height of 51.6 meters above ground, to meet ANSI guidelines. Again, using the worst case antenna, the proposed facility is in compliance with its antenna at 54 meters above ground level.

The same table shows that if just two bays were used, the required height above ground, assuming a 100Kw facility (single polarization) would need just 27 meters in height.

Since a worst case antenna is found to be within ANSI limits, any other antenna arrangement for achieving ERP will only be better.

The AM facility will have been moved from the site to a location in excess of 10 kilometers from this site. The Commission has accepted the major change application which is on cut-off list A-157 (cut-off date: March 2, 1990). The file No. for that situation is BP-891103AF.

**ATTACHMENT C**

Mims Community Radio, Inc.  
Channel 202C1 at Oak Hill, Florida

To be included with FCC form 340, Application to Construct or Make  
Changes in an Existing Commercial Broadcast Staation.

CERTIFICATION OF SITE AVAILABILITY

1. The applicant certifies that it has reasonable assurance in  
good faith that the site or structure proposed in Section V-B, Form  
340, as the location of its transmitting antenna, will be available  
to the applicant for applicant's intended purpose.

YES   X   NO           

If no, explain fully:

2. If reasonable assurance is not based on applicant's ownership  
of the proposed site or structure, applicant certifies tthat it has  
obtained such reasonable assurance by contacting the owner or person  
possessing control of the site or structure.

<u>Randy Henry</u>	<u>(407)</u>	<u>267 3000</u>
Name of person contacted	Telephone Number	

Person contacted (check one):

Owner            Owner's Agent            Other   X   see note below

Mary Jo Loney (Sec.)  
Applicant's Signature

11/24/89  
Date

Note: The proposed structure is owned by Florida Public Radio, Inc.,  
which has granted permission for two mutually exclusive applicants, the  
other of which is yet to be filed. Randy Henry is president of  
the nonprofit corporation that owns the tower, who also has prepared  
the engineering section of this application.

**ATTACHMENT D**

6151 927-8474

*Larry D. Perry*

*Counsellor at Law*

SEP 26 2 47 PM '91

AUDIO SERVICES  
DIVISION

PROCESSED  
SEP 26 1 25 PM '91  
DISPATCHED  
One Tennessee Square  
Oak Ridge, Tennessee 37831-3194  
September 24, 1991

FL  
Vinn Park  
# 4

Secretary  
Federal Communications Commission  
Washington, D.C. 20554

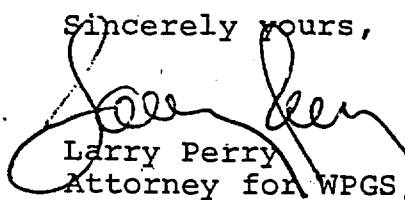
RE: WPGS (AM) CONSUMMATION OF ASSIGNMENT (BAL-910710EE)

Dear Ms Searcy:

This is to advise you that the assignment of AM broadcast station WPGS located in Mims, Florida, has been consummated as of September 20 1991. An Ownership Report FCC Form 323 is being filed under separate cover via Mellon-Pittsburg.

Should you have any questions concerning this matter, please don't hesitate to contact this office for clarification.

Sincerely yours,

  
Larry Perry  
Attorney for WPGS, Inc.

CC; WPGS

LP/eb

SEP 27 1991  
FBI - MEMPHIS

**ATTACHMENT E**

**VERIFIED STATEMENT**

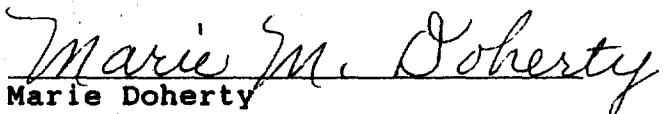
I, Marie Doherty, make the following statement under penalty of perjury of the laws of the United States and the State of Florida.

1. I am the owner of standard broadcast station WPGS, Mims, Florida, operating on 840 kHz.

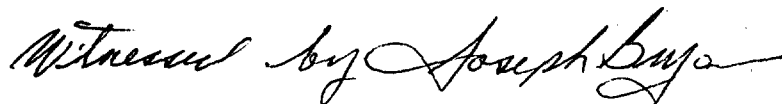
2. I have been shown filings made with the FCC by Mims Community Radio, Inc. which specify the WPGS(AM) tower as the antenna site location for an FM application on channel 202.

3. No representative of Mims Community Radio, Inc. has ever contacted me, or anyone with authority at WPGS, requesting authority to specify our site in their application.

4. If such a request were made to me it is extremely unlikely that WPGS(AM) would agree to locate an FM antenna on our tower. I have been informed by my engineer that there could be technical problems created by such a collocation which would be extremely difficult to overcome.

  
Marie Doherty

Executed this 9<sup>th</sup> day of June 1992.



June 9<sup>th</sup>, 1992

CERTIFICATE OF SERVICE

I, Glinda M. Corbin, a secretary in the law offices of May & Dunne, Chartered, hereby certify that I have caused to be hand delivered this 9th day of July 1992, a true and correct copy of the foregoing PETITION TO ENLARGE ISSUES to the following:

The Honorable Edward J. Kuhlmann  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 220  
Washington, D.C. 20554

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Federal Communications Commission  
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(Attorney for Hispanic Broadcast System, Inc.)

By: Glinda M. Corbin  
Glinda M. Corbin

\*via telecopier